DAVID E. HOOVER AND LESTER F. WHALLEY

IBLA 86-394 Decided October 26, 1987

Appeal from a decision of the California State Office, Bureau of Land Management, declaring mining claims located for nonmetalliferous minerals null and void ab initio. CA MC 168074, CA MC 168079-81, CA MC 168083, CA MC 168088-90, CA MC 168094-114, CA MC 168126-43.

Affirmed.

1. Withdrawals and Reservations: Generally -- Withdrawals and Reservations: Temporary Withdrawals

   A withdrawal of land made under the authority of the Pickett Act remains in effect until revoked.

2. Mining Claims: Lands Subject To -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Generally

   The standard for distinguishing under the Pickett Act whether a mineral deposit is metalliferous or nonmetalliferous is that if the deposit contains a metal chemically and physically akin to the primary metals and is worked essentially for the production of that metal, which is extracted and used in the trades as such, the deposit is metalliferous. If the minerals contained in the deposit contain metals but are extracted and used mainly in the form of compounds with other elements, the deposit is nonmetalliferous.

3. Mining Claims: Specific Mineral Involved: Pozzolan

   Pozzolan is a nonmetalliferous mineral.

APPEARANCES: Lester F. Whalley, Esq., Gardena, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

David E. Hoover and Lester F. Whalley have appealed a decision of the California State Office, Bureau of Land Management (BLM), dated January 16, 1986, as modified by a decision dated January 24, 1986, declaring 47 lode and placer mining claims null and void ab initio. In its decision BLM stated that since 1933 the lands upon which the claims were located had been withdrawn

from all mineral entry other than for metalliferous minerals and that pozzolan, the mineral for which the claims were located, is a nonmetalliferous mineral. No authority was cited by BLM for its conclusion that pozzolan is a nonmetalliferous mineral.

The case file on appeal contains location notices for the Victory 1-9 lode mining claims and the Victory 1-64 placer mining claims. The location notices for all of the claims state that they were located August 5, 1985. Date and time stamps show that the location notices for the claims were recorded with the Inyo County, California, recorder on the same day and filed with BLM August 6, 1985. The descriptions contained in the location notices indicate that all of the claims occupy land within secs. 13, 23, and 24, T. 21 S., R. 37 E., and secs. 18 and 19, T. 21 S., R. 38 E., Mount Diablo Meridian (M.D.M.). The quarter sections designated in the location notices for the Victory 1-9 lode claims are identical to the quarter sections designated for the respective Victory 1-9 placer claims. 1/

BLM's initial decision declared the Victory 1-3 and 6-9 lode claims and the Victory 1-3, 6-23, 26-32, and 43-64 placer claims null and void because they were located for nonmetalliferous minerals on land in secs. 23 and 24, T. 21 S., R. 37 E., and secs. 18 and 19, T. 21 S., R. 38 E., M.D.M., withdrawn by Executive Order (EO) No. 6206. The decision also noted that the Victory 24 and 25 placer claims were null and void because they had been located on previously patented land within N 1/2, sec. 23, T. 21 S., R. 37 E., M.D.M. By a supplemental decision BLM vacated its initial decision as to appellants' claims in secs. 18 and 19, T. 21 S., R. 38 E., M.D.M., because these sections were restored to mineral locations for nonmetalliferous minerals by Public Land Order No. 499, effective September 15, 1948. 13 FR 4189 (July 22, 1984). In their statement of reasons appellants concede that the Victory 24-25 placer claims are null and void. Thus, the claims remaining at issue on appeal are the Victory 1 and 6-8 lode claims and the Victory 1, 6-8, 12-32, and 43-60 placer claims.

Appellants do not dispute the legal status of the lands occupied by the claims at issue. The lands, along with numerous other areas, were "temporarily withdrawn from settlement, location, sale, or entry * * * in aid of proposed legislation withdrawing the lands for the protection of the water supply of the City of Los Angeles" by EO No. 6206 signed by President Franklin D. Roosevelt, July 16, 1933. The order states that the lands are

1/ No further information as to the relation of the Victory 1-9 lode and placer claims on the ground appears in the case file. Thus, there is no clear indication that the lodes and placers were located on the same land or, if so, the order of their location. Nor is there any information as to the characteristics of the pozzolan deposit for which the claims were located other than that presented by appellant and subsequently described in this opinion.

withdrawn "[u]nder authority of the act of Congress approved June 25, 1910 (36 Stat. 847-848), as amended by the act of August 24, 1912 (37 Stat. 497)."

The Act of June 25, 1910, commonly referred to as the Pickett Act, granted the President authority to temporarily withdraw public lands "for water-power sites, irrigation, classification of lands, or other public purposes." Ch. 421, § 1, 36 Stat. 847 (1910). However, the act provided that lands withdrawn under its authority were to remain open under the mining laws for the location of "minerals other than coal, oil, gas, and phosphates." Id. § 2. The Act of August 24, 1912, amended in full section 2 of the Pickett Act, changing the limitation to state the withdrawn lands were to remain open under the mining laws to locations for "metalliferous minerals." Ch. 369, 37 Stat. 497 (1912).

The Pickett Act was codified at 43 U.S.C. §§ 141-143, corresponding to sections 1 through 3 of the 1910 legislation, with one proviso of section 2 codified at 16 U.S.C. § 471. Section 3 of the 1910 legislation requiring the Secretary of the Interior to report withdrawals to Congress was repealed by P.L. 86-533, 74 Stat. 245, 248 (1960). Section 1, granting the President withdrawal authority, was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA). P.L. 94-579, § 704, 90 Stat. 2743, 2792 (1976). Except for two provisos, FLPMA also repealed section 2 of the 1910 Act, as amended in 1912, containing the limitation as to mining locations for metalliferous minerals. Id.

[1] The repeal of the Pickett Act did not affect withdrawals made under its authority. Id. at 2786, § 701(c); 43 U.S.C. § 1701 note (1982). Nor does the fact that the 1933 withdrawal stated, in accord with the authority granted by the Pickett Act, that the withdrawal was temporary and in aid of legislation affect its continuing validity or the status of the land affected by it. The Act itself provided that withdrawals made under the authority it granted "shall remain in force until revoked by him [the President] or by an Act of Congress." Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847. It has long been recognized as a matter of law that withdrawals made under the Pickett Act remain in effect until revoked. Mecham v. Udall, 369 F.2d 1, 4 (10th Cir. 1966); Shaw v. Work, 9 F.2d 1014 (D.C. Cir. 1925); Clinton D. Ray, 59 I.D. 466, 468 (1947) (EO 6206).

Each of appellants' location notices states that the claim it represents was located based on a discovery of pozzolan. "Pozzolan" (also "pozzolana") is defined as:

> A leucitic tuff quarried near Pozzuoli, Italy, and used in the manufacture of hydraulic cement. The term is now applied more generally to a number of natural and manufactured materials, such as ash, slag, etc., which impart specific properties to cement. Pozzolanic cements have superior strength at a late age and are resistant to saline and acidic solutions.

Bureau of Mines, A Dictionary of Mining, Mineral, and Related Terms 856 (P. Thrush, ed., 1968). The same reference also states:

> A pozzolana is defined as a material which is capable of reacting with lime in the presence of water at ordinary temperature to produce a cementitious compound. Natural pozzolanas are silicious material of volcanic origin. They include trass and Santorin earth. Blast furnace slag is used to produce artificial pozzolanas.

Id.

Appellants have provided a copy of the standards established by the American Society for Testing and Materials for fly ash and pozzolan when used as a mineral admixture in Portland cement concrete. Appellants point out that the standards require a 70-percent content of silicon dioxide, aluminum oxide, and iron oxide and that as a secondary requirement pozzolan may be required to contain 5-percent magnesium oxide. ANSI/ASTM C 618-78. Appellants state that the metallic oxides are required because the oxides react with calcium hydroxide released by cement when hardening to give the superior strength and durability pozzolan cement is noted for.

Appellants also have submitted a semiquantitative analysis of a sample of the mineral from their claims showing it to contain aluminum, iron, magnesium, and small amounts of other minerals. An additional analysis converts the results of the semiquantitative analysis and compares them with the ANSI/ASTM standards. Appellants argue that because metallic oxides are necessary components of pozzolan, and because pozzolan contains metallic components, the mineral for which their claims were located should be considered a metalliferous mineral exempt from the 1933 withdrawal. Appellants also argue that the definition of "metalliferous" should be that "understood by the average miner who stakes a claim relying on the common understanding in the industry as to the meaning of the word." (Statement of Reasons at 8.)

[2] We have examined the materials submitted by appellants and have considered their arguments. We find that the proper and controlling standard as to the definition of "metalliferous" in the Pickett Act was adopted by the Department in 1918 when the issue was first raised:

> If the mineral deposit contains a metal chemically and physically akin to the primary metals and is worked essentially for the production of that metal which is extracted and used in the trades as such, the deposit should be classed as metalliferous. On the other hand, where the metals contained in the deposit, or ore, are extracted and used mainly in the form of compounds with other elements, the classification should be nonmetalliferous.

Consolidated Ores Mines Co., 46 L.D. 468, 471 (1918). The material at issue in the Consolidated decision was carnotite, a mineral composed of potassium, uranium, and vanadium. The opinion noted that the latter two

elements are sometimes classified as metals, but because in 1918, when the decision was issued, neither were "dealt with in the metal market or the trades in their elemental forms, as metals, and are not so produced or recovered immediately in the reduction of carnotite ore" it was concluded that carnotite is not a metalliferous mineral. Id. Regarding the use of "metalliferous minerals" in the Pickett Act, the decision concluded that the term "was used to describe those minerals or ores of economic value from which the useful metals could be directly and advantageously extracted." Id. at 472.

The standard established in 1918 was followed when carnotite was deemed to be a metalliferous mineral in 1954. Solicitor's Opinion, "Whether Carnotite is a Metalliferous or Nonmetalliferous Mineral," M-36225 (Sept. 8, 1954). The opinion stated that the 1918 decision was correct on the basis of the facts existing at the time. Id. at 2. The opinion, however, found that the use of uranium had changed since 1918 due to the development of nuclear weapons and uranium's potential use for nuclear energy, both requiring the use of uranium in its metallic form and that carnotite could be mined and sold for its contained metal. The opinion concluded: "Since carnotite is now principally valuable for its uranium which is produced and used as a metal, it is beyond doubt a metalliferous mineral * * *." Id. at 3.

[3] We believe the standard adopted in 1918 should be adhered to in the present case. As noted at the time, it comports with the standard dictionary definition of "metalliferous" as "yielding or producing metal." Consolidated Ores Mines Co., supra at 471. The distinction between minerals which are mined for the purpose of extracting a metallic component to be used as a metal and minerals which are mined for a metallic component used in a compound form also seems to be in accord with both common and industry usages. For example, while calcium is a metallic element, neither limestone nor gypsum are commonly regarded as metals, nor is their extraction normally spoken of as the mining of a metal. Thus, the Department's standard does not appear to give miners any reason for uncertainty as to the nature of a discovery they may make in exploring land withdrawn from the location of mining claims for nonmetalliferous minerals. It is unlikely that a party discovering a valuable mineral deposit does not know whether the mineral he has discovered is valuable because it can be mined and processed to be sold and used as a metal or because it can be mined and sold to be used in some other form. Applied to appellants' discovery of pozzolan, it is clear that the value of the deposits within the claims lies in its potential use as a component of cement rather than as an ore to be processed to yield aluminum or some other metal. It is also clear that appellants intended to produce and sell pozzolan as a nonmetalliferous mineral, and did not intend to use the mineral as raw ore for aluminum, iron, magnesium, or the other metals shown in their analysis.

Therefore, we conclude that the pozzolan within appellants' claims is a nonmetalliferous mineral and that pozzolan cannot sustain valid locations on land withdrawn from the location of mining claims except for metalliferous minerals. Walter Pedersen, A-27734 (Dec. 17, 1958); United States v. Petty,

A-26224 (Oct. 9, 1951); Bob Barber, A-24669 (Aug. 15, 1947). See Clinton D. Ray, supra. Cf. Hare v. French, 44 L.D. (1915) (land containing clay composed of 24- to 27-percent aluminum oxide which could not be commercially processed could be appropriated under the desert land laws); Bettancourt v. Fitzgerald, 40 L.D. 620 (1912) (clay suitable only for use in manufacture of cement not locatable).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge